Appendix A

Supreme Court of Michigan

Jan. 12, 2006
129042 & (92)(83)(84)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
TIMOTHY BRUCE HUFFMAN,
Defendant-Appellant.
_____/

SC: 129042
COA 252315
Kent CC: 03-002313-AR
61st DC: 2000-SM-1326

On order of the Court, the motions to admit James N. Horwood, Peter J. Hopkins, Tillman L. Lay and Eugene Volokh pro hac vice are GRANTED. The motion for leave to file a brief amicus curiae is GRANTED. The application for leave to appeal the May 10, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH and KELLY, JJ., would grant leave to appeal.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 12, 2006

/s/
Clerk

Appendix B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION May 10, 2005 9:05 a.m.
v. Timothy Bruce HUFFMAN, Defendant-Appellant.	No. 252315 Kent Circuit Court LC No. 03-002313-AR Official Reported Version

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

BANDSTRA, J.

Defendant produced and arranged for the cable transmission of a television show featuring exposed genitalia. In this appeal, he seeks to have his conviction under Michigan's open or indecent exposure statute overturned primarily because of his arguments that the statute does not apply to television programming and that, if it does, he cannot be convicted under First Amendment principles. We conclude, both because the statute includes no limitation that would prevent its application to television exposures and because such exposures can be more offensive than a more traditional public exposure, that the statute was properly applied against defendant. Further, employing the four-part test required by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and its progeny, we conclude that defendant's conviction under the statute did not violate the First Amendment.

I. Basic Facts and Proceedings Below

Defendant regularly produces television programs that are distributed on the Grand Rapids public-access cable channel, GRTV. At issue here is the sixty-eighth episode of the show he has entitled "Tim's Area of Control." After defendant submitted a videotape of that episode to GRTV, it was shown on March 31, 2000, and April 7, 2000, both times between 10:30 and 11:00 p.m., without any prescreening. The episode included a three-minute segment in which a flaccid penis and testicles marked with facial features were the only objects within camera range. During this segment, a voice-over was heard identifying the penis character as "Dick Smart" and providing purportedly humorous commentary as if on behalf of the character.[1] Only Smart was shown on the videotape; the

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1 The transcript of the segment is as follows:

Hey, how ya doing, ya, ya, ya. Hi, I'm Dick Smart I am a comedian, yeah, stand up, ha. Yeah, yeah, look over there, look over there it awe [sic] there is a whole table of dick heads over there, I can't believe it yeah, what a crowd, what a crowd. Oh I love it when it's exciting like this, ya know what I mean.

Hey listen I got a joke for you, 2 guys they go into a bar, yeah, yeah, yeah, whats [sic] the matter with you lady, you never seen a dick before? One guy says to the other guy, hey I gotta go to the head, order me a draft beer and a tuna fish sandwich would ya and he says yeah. Okay so the guy kinda goes into the bar, ya and the bartender says, "what do ya need" he says I need 2 draft beers and a tuna fish sandwich. What what ya heard this one before or what, shut up then okay. So he says okay he says I'll bring your drink to you, the guy goes down to the bar, turns around half-way down the bar and goes hey, he goes are you gay? The guy says what, no, I'm just in a god [sic] mood, ha, ha ha, awe [sic] you heard that one before, I can't believe it, don't you people laugh or what, are ya all getting enemas?

What's the deal with you over there you never seen a funny dick before or what (laughter). Yeah, I was in the grocery store the other day a guy comes up and he says "hey, you're a dick" I says yeah so are you, ha, ha. I can't believe it, yeah, yeah, yeah, yeah, yeah, I was in the army ya know, yeah, yeah, I didn't do much, ya know what I mean? I just hung around (laughter). Yeah, yeah, so I was walking down the sidewalk the other day

rest of the body that would otherwise be visible was shrouded with a cloth.

The GRTV public-access channel is available to approximately 46,000 cable subscribers in the Grand Rapids community. One of those subscribers who was watching on April 7, 2000, lodged a complaint with GRTV and, following an investigation, a search warrant was executed and the police seized a copy of a videotape containing the Dick Smart segment at defendant's home. Defendant was arrested and charged with a violation of M.C.L. § 750.335a, Michigan's "open or indecent exposure" statute. He was convicted in district court and sentenced to one day in jail, with credit for time served, and twelve months of probation. He was also fined $500 and ordered to pay costs totaling an additional $525. Defendant appealed his conviction to the circuit court, which affirmed. We granted defendant's application for leave to appeal.

II. Does the "Open or Indecent Exposure" Statute Apply to Television Images?

Defendant first argues that his conviction must be reversed because M.C.L. § 750.335a cannot be properly construed to apply to televised images. Construction of a statute is a question of law that we review de novo. *People v. Spanke*, 254 Mich. App. 642, 645, 658 N.W.2d 504 (2003).

The statute under which defendant was charged and

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and ya know I was just looking around and I don't know about you, but when I see a good looking woman and it's kind of balmy out and I kinda change I'm like a Doctor Jekyll and Mr. Hyde kinda guy (laughter). Ya know what I mean some people, I had a woman tell me the other day she thought I looked like Hulk Hogan (laughter) I said yeah, you crazy stupid bitch, Hulk Hogan, hell, he's rich, yeah I'm just some dick head I just ya know I make people laugh, I get a couple of bucks ya know what I mean everyone's gotta eat, ya know what I'm sayin. Well ah a little two step I learned when I was in the Nam-yeah.

convicted provided, in relevant part, "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor...." M.C.L. § 750.335a.

Defendant does not argue that he did not act "knowingly" in producing and submitting the Dick Smart tape for cable distribution, nor does it matter under the statute whether the character was portrayed by defendant's penis or that of another person. At issue here is whether televising an image of a naked penis is an "open or indecent exposure" under the language of the statute. Defendant argues that "[t]he application of this statute or, indeed, any indecent exposure statute, to television or film images is unprecedented." While that may well be the case, defendant points to no authority holding that the language of this statute, or any similar statute, does not encompass televised images.

While not factually similar, *People v. Vronko,* 228 Mich. App. 649, 579 N.W.2d 138 (1998), provides us guidance on this question. A panel of our Court construed M.C.L. § 750.335a in a manner "consistent with our interpretation of the statutes proscribing 'gross indecency,'" M.C.L. §§ 750.338 through 750.338b. *Vronko, supra* at 656, 579 N.W.2d 138. The panel noted that "[t]he gross indecency statutes seek to protect the public from the possibility of being exposed to certain acts of sexual conduct. Such conduct is grossly indecent 'when an unsuspecting member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act.'" *Id.* (citation omitted). Further, the panel noted that "open exposure" under M.C.L. § 750.335a has been defined as "'any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended.'" *Id.*, quoting *In re Certified Question (Jewell Theatre Corp. v. Oakland Co. Prosecutor),* 420 Mich. 51, 63, 359 N.W.2d 513 (1984) (Boyle,

J., concurring). The *Vronko* panel adopted Justice Boyle's reasoning that "'[t]his standard would require evaluation of the setting in which the exposure took place in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended by what was seen.'" *Vronko, supra* at 656-57, 579 N.W.2d 138, quoting *In re Certified Question, supra* at 63, 359 N.W.2d 513 (Boyle, J., concurring).

Similarly here, we conclude that the purposes of the indecent exposure statute are best fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure. Defendant admits that, had he staged the Dick Smart production in a traditional "public square," like Grand Rapids' downtown Calder Plaza, the statute would apply. Nonetheless, he argues that such a live, in-person exhibition presents a greater threat and offense to observers than a televised exhibition, where the exposed person is not physically present.

While we agree that a televised exposure is qualitatively different than a physical exposure, we note that, in some ways, it can be more offensive and threatening. While a person might minimally suspect that some stranger might expose himself in a public forum, to be subjected to a televised exposure in the privacy of a home is likely a more shocking event. Further, defendant's exposure, while televised, was presumably more of an immediate closeup than would occur if he had been physically present with those subject to his exposure. The Dick Smart character portrayed on TV screens was probably larger than actual size and the exposure continued for fully three minutes, much longer than would have likely been allowed on Calder Plaza or in some other public square.

There is no doubt that defendant should have expected, or in

fact did expect, that someone would observe the Dick Smart segment and be offended by it. *Vronko, supra* at 656-657, 579 N.W.2d 138. Like the courts below, we see no reason to read into the statute a limitation that would prevent its application to defendant's televised and, therefore, powerfully effective exposure. We hold that the statute was properly applied to encompass an "open or indecent exposure" in the form of a televised image.

This conclusion regarding M.C.L. § 750.335a is not disturbed by defendant's argument that another statute, M.C.L. § 750.38, also covers images of nudity.[2] While a criminal charge might have been brought under M.C.L. § 750.38, the prosecutor had discretion to bring a charge under M.C.L. § 750.335a instead. *People v. Ford,* 417 Mich. 66, 92, 331 N.W.2d 878 (1982). For the reasons stated, defendant's conduct fell within the purview of M.C.L. § 750.335a and the charge brought against him under that statute was appropriate.

III. Did Sufficient Evidence of Venue Exist?

Defendant further contends that the trial court erred by denying his motion for a directed verdict because there was insufficient evidence showing that the indecent exposure occurred within the venue of the district court, the city of Grand Rapids. We review the record de novo to determine whether a rational trier of fact could have determined that this element of the crime was proven beyond a reasonable doubt. *People v. Aldrich,* 246 Mich. App. 101, 122, 631 N.W.2d 67 (2001).

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2 M.C.L. § 750.38 provides, in relevant part:

> Any person who shall post, place or display on any sign board, bill board, fence, building, sidewalk, or other object, or in any street, road, or other public place ... any representation of the human form in an attitude or dress which would be indecent in the case of a living person, if such person so appeared in any public street, square or highway, shall be guilty of a misdemeanor.

Defendant's argument concentrates on the lack of evidence regarding the place where the Dick Smart film was taped. However, that taping did not constitute the "exposure" for which defendant was charged under the statute; no one allegedly observed the taping or took offense because of it. Instead, the exposure offense occurred when defendant arranged for the tape's delivery to GRTV, in Grand Rapids, for the purpose of having it distributed by cable network into thousands of homes, many of which are located in Grand Rapids. We reject defendant's argument in this regard.

IV. Does the Conviction Violate Defendant's First Amendment Right to Free Speech?

Defendant argues that his First Amendment right to free speech was violated by his conviction under the indecent exposure statute. Questions regarding the constitutionality of statutes are matters of law that we review de novo. *People v. Jensen (On Remand)*, 231 Mich. App. 439, 444, 586 N.W.2d 748 (1998).

This issue is governed by a case concerning draft card burning, *O'Brien*, and two cases applying *O'Brien* in a context similar to this case, i.e., nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). In *O'Brien*, the Supreme Court analyzed the act of burning a draft card as one involving "'speech' and 'nonspeech' elements ... combined in the same course of conduct...." *O'Brien, supra* at 376, 88 S. Ct. 1673. The Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" applicable to the speech elements. *Id.* The *O'Brien* Court announced a four-part test for determining whether a governmental regulation is sufficiently justified in this context:

a court must examine "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673.

The four-part *O'Brien* test was used by a plurality of justices in *Barnes.*[3] The *Barnes* defendants had been convicted under an Indiana statute providing, in pertinent part, that "'[a] person who knowingly or intentionally, in a public place . . . appears in a state of nudity . . . commits public indecency, a Class A misdemeanor.'" *Barnes, supra* at 569 n. 2, 111 S. Ct. 2456 (opinion of Rehnquist, C.J.), quoting a former version of Ind. Code 35-45-4-1(a). The defendants were businesses that staged adult entertainment for their patrons, along with nude female dancers they employed.

With respect to the first two parts of the *O'Brien* analysis, the *Barnes* plurality held that "[t]he public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests." *Id.* at 567, 111 S. Ct. 2456. The justices noted that "the statute's purpose of protecting societal order and morality is clear" and that

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3 A fourth justice "agree[d] with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in [*O'Brien*]," but applied that analysis differently. *Id.* at 582, 111 S. Ct. 2456 (Souter, J., concurring). In addition, Justice Scalia concurred in the judgment of the plurality, reasoning that the First Amendment was simply inapplicable to the public nudity statute. *Id.* at 572, 111 S. Ct. 2456 (Scalia, J. concurring) ("[T]he challenged regulation ... as a general law regulating conduct and not specifically directed at expression ... is not subject to First Amendment scrutiny at all."). While we review defendant's conviction under the *Barnes* plurality's approach, we note that it would also be upheld under the analysis employed by Justice Scalia.

"[p]ublic indecency statutes of this sort are of ancient origin and presently exist in at least 47 States." *Id.* at 568, 111 S. Ct. 2456. Further, "[p]ublic indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places." *Id.* "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Id.* at 569, 111 S. Ct. 2456.

With respect to the first two parts of the *O'Brien* test, we discern no difference between the Indiana public nudity statute in *Barnes* and the Michigan indecent exposure statute at issue here. Adopting the analysis of the Supreme Court as equally applicable here, we conclude that Michigan's indecent exposure statute is clearly within the constitutional power of the state and that it furthers substantial governmental interests.

With respect to the third part of the *O'Brien* test, the *Barnes* plurality held that the governmental interest in protecting morals and public order through the prohibition of public nudity "is unrelated to the suppression of free expression." *Id.* at 570, 111 S. Ct. 2456.

> Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message . . .
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> But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any

> interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. [*Id.* at 570-571, 111 S. Ct. 2456.]

Similarly, the "perceived evil" that Michigan seeks to address through its indecent exposure statute is not the communication of some message associated with indecent exposure; it is the indecent exposure itself. In other words, defendant's Dick Smart segment is not proscribed because of any message it conveys; similar conduct by others having no message whatsoever would be similarly proscribed. Further, the requirement of some minimal clothing does not deprive Dick Smart of his message; it simply makes that message slightly less graphic. Thus, Michigan's indecent exposure statute does not prevent the conveyance of any message. It merely requires that messages must be conveyed within minimal bounds of proscribed conduct having nothing to do with expression.

Finally, the *Barnes* plurality considered the fourth part of the *O'Brien* test:

> The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion

> above, the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose. [*Id.* at 571-72, 111 S. Ct. 2456.]

Again, we find this analysis applicable to the Michigan indecent exposure statute, and conclude that the incidental restriction on defendant's First Amendment freedom is no greater than is essential to the furtherance of the governmental interest in promoting public morality by prohibiting public nudity.

In a more recent opinion, a plurality of justices of the Supreme Court[4] again employed the *O'Brien* test to conclude that a city ordinance prohibiting appearing in public in a "state of nudity" did not violate First Amendment rights in application to nude dancing. *Erie, supra* at 296-302, 120 S. Ct. 1382 (opinion of O'Connor, J.). With respect to the second part of the *O'Brien* test, whether the public nudity ordinance furthered an important governmental interest, the plurality concentrated on "harmful secondary effects associated with nude dancing...." *Id.* at 296, 120 S. Ct. 1382. The preamble to the ordinance stated that its purpose, in part, was to prevent "'"an atmosphere

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4 The plurality in *Erie* consisted of four justices. *Erie, supra* at 282, 120 S. Ct. 1382 (opinion of O'Connor, J.). In addition, Justice Scalia was joined by Justice Thomas in the view, set out earlier in his concurring opinion in *Barnes*, that, because the ordinance prohibited the act of going nude in public, irrespective of any expressive purposes, "'it is not subject to First Amendment scrutiny at all.'" *Id.* at 307-08, 120 S. Ct. 1382 (Scalia, J., concurring), quoting *Barnes, supra* at 572, 111 S. Ct. 2456 (Scalia, J., concurring).

conducive to violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases and other deleterious effects"'" in association with nude dancing. *Id.* at 290, 120 S. Ct. 1382 (citations omitted). Defendant here argues that such "harmful secondary effects" are necessary to justify Michigan's public indecency statute, but we do not conclude that *Erie* stands for this proposition. The prevention of such secondary effects is certainly sufficient to satisfy the second part of the *O'Brien* test, but nothing in *Erie* suggests that it is necessary. No such secondary effects were considered in *Barnes;* the plurality found sufficient governmental interest merely on the basis that preventing public nudity promotes public morality. *Barnes, supra* at 568-569, 111 S. Ct. 2456 (opinion of Rehnquist, C.J.). *Erie* did not disavow that approach, and we conclude that the promotion of public morality through the prohibition of indecent exposure is a sufficient governmental interest to satisfy the second part of the *O'Brien* test. "The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment ... that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Erie, supra* at 310, 120 S. Ct. 1382 (Scalia, J., concurring) (emphasis in original). The same analysis applies in this indecent exposure case.

Defendant seeks to avoid the analysis of *O'Brien; Barnes*, and *Erie* by arguing that we should examine precedents involving regulations of cable television programmers, citing especially *Denver Area Ed. Telecom. Consortium, Inc. v. Fed. Communications Comm.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). However, as the plurality opinion in *Erie* expressly stated, "We now clarify that government restrictions on public nudity such as the ordinance at issue here should be

evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Erie, supra* at 289, 120 S. Ct. 1382 (opinion of O'Connor, J.). In his separate opinion, Justice Souter specifically agreed with that conclusion. *Id.* at 310, 120 S. Ct. 1382 (Souter, J., concurring in part and dissenting in part). Thus, a majority of the Supreme Court held that cases like that before us now, involving content-neutral restrictions on expressive conduct that constitutes symbolic speech, must be tested under the *O'Brien* analysis. Cases like *Denver* and *Playboy,* which involve content-specific restrictions on speech itself, are simply inapposite to the question presented in this appeal.

Further, the United States Supreme Court has noted that, of all forms of communication, it is broadcasting that has "the most limited First Amendment protection." *Fed. Communications Comm. v. Pacifica Foundation,* 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). The Court so reasoned, in part, because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," meaning that "[p]atently offensive, indecent material ... confronts the citizen, not only in public, but also in the privacy of the home," generally without sufficient prior warning to allow the recipient to avoid it. *Id.* This same reasoning applies to cable television broadcasting. *Denver, supra* at 744, 116 S. Ct. 2374 (opinion of Breyer, J.). Under *O'Brien* and its progeny, defendant would have been properly subject to conviction for indecent exposure had he staged the Dick Smart segment in a traditional public square. He becomes entitled to no greater First Amendment protection, and cannot inoculate himself against criminal liability, by channeling his exposure through a cable television network.

V. Is M.C.L. § 750.335a Unconstitutionally Vague and Overbroad?

Defendant contends that the statute is unconstitutionally vague and overbroad. Questions regarding the constitutionality of statutes are matters of law that we review de novo. *Jensen, supra* at 444, 586 N.W.2d 748.

In *Vronko,* a panel of our Court considered whether the language "open or indecent exposure" in M.C.L. § 750.335a was unconstitutionally vague and determined that it was not. The panel noted that "[a] statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Vronko, supra* at 653, 579 N.W.2d 138. The panel noted that the Michigan Supreme Court has reasoned that the "'well settled and generally known significance of the phrase "indecent and obscene exposure of the person" is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others.'" *Id.*, quoting *People v. Kratz,* 230 Mich. 334, 337, 203 N.W. 114 (1925). The panel further reasoned that, under common dictionary definitions of the words contained in M.C.L. § 750.335a, the defendant was fairly placed on notice that his intentional exposure of his genitals in a place where such exposure was likely to be an offense against generally accepted standards of decency constituted "indecent exposure." *Id.* at 654, 579 N.W.2d 138.

To the extent that defendant here argues that he was not fairly on notice that the conduct leading to his conviction was "open or indecent exposure," we agree with *Vronko* and reject that argument. Further, the trier of fact in this case was instructed on the meaning of "open or indecent exposure" as those terms have been described and defined in judicial

precedents; it was not left with "unstructured and unlimited discretion to determine whether an offense had been committed," in contravention of constitutional principles. *Id.*

It seems, however, that defendant's primary challenge regarding the vagueness of the statute is that he was not on fair notice that it could apply to an exposure occurring through a cable network telecast, rather than one that was live and in-person. We have considered a similar argument in part II of this opinion, and we reiterate the conclusion reached there. The statute does not by its terms suggest, in any manner, that an "open or indecent exposure" can occur only if the exposing person and the victims subject to the exposure are physically in the same place. As we noted, the offense to those subjected to the exposure may, in fact, be greater if the exposure is accomplished through a television medium. The record seems clear that defendant intended to maximize the impact of his open or indecent exposure by using the cable medium, and we can see no reason to conclude that he was not fairly on notice that a criminal charge and conviction could result.

Finally, we note that this case involves a First Amendment argument, meaning that the statute might be subject to an argument that it is overly broad. *Id.* at 652, 579 N.W.2d 138. However, other than mentioning this in passing as part of his vagueness challenge, defendant makes no further First Amendment argument beyond that which we have already considered in part IV of this opinion. To the extent that defendant would raise a separate overbreadth argument, we consider that argument waived.

VI. Exclusion of Evidence and Jury Instructions

With respect to the manner in which his trial was conducted, defendant first argues that the trial court erred by excluding evidence regarding nudity in other television programming. The decision whether to admit evidence is

within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Katt*, 468 Mich. 272, 278, 662 N.W.2d 12 (2003).

Defendant presents only a cursory argument on this issue, without any supporting authority, and we consider this claim abandoned. *People v. Watson*, 245 Mich. App. 572, 587, 629 N.W.2d 411 (2001). Further, even if we were to conclude that defendant had preserved this claim and that it had merit, any error would be presumed harmless under M.C.L. § 769.26 unless it was outcome-determinative. *People v. Whittaker*, 465 Mich. 422, 426-27, 635 N.W.2d 687 (2001). Assuming, as we have today decided, that M.C.L. § 750.335a reaches defendant's conduct and that the statute is constitutional, the evidence of defendant's guilt is overwhelming. We do not conclude that, had defendant been allowed to introduce the evidence at issue here, the outcome of his trial would have been different.

Defendant also contends that various jury instructions he proffered to the trial court were improperly rejected. Again, however, defendant cites no authority in support of the instructions offered, and he has abandoned this issue. *Watson, supra*. And again, this argument fails on the merits, even if it had been properly presented. We review jury instructions in their entirety to determine if reversal is required on the basis of an error in jury instructions. *People v. Moldenhauer*, 210 Mich. App. 158, 159, 533 N.W.2d 9 (1995). If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required. *Id.* Error requiring reversal only occurs if requested instructions (1) were substantially correct, (2) were not substantially covered in the charge given to the jury, and (3) concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense. *Id.* at 159-160, 533 N.W.2d 9. We have reviewed the instructions the trial court gave the jury and conclude that, taken as a whole, they accurately reflected the

elements of the crime charged and otherwise sufficiently protected defendant's rights. The additional instructions that defendant advocated were either erroneous as a matter of law, cumulative to the instructions actually given, or a reiteration of arguments defendant was allowed to present about how the case should be resolved. We conclude that the trial court did not err by failing to give the jury the additional instructions.

We affirm.

/s/ Richard A. Bandstra
/s/ Bill Schuette
/s/ E. Thomas Fitzgerald

Appendix C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court Case No.
01-11061-AR
District Court Case No.
2000-SM-1326

TIMOTHY BRUCE HUFFMAN,

Defendant.
_____/

OPINION AND ORDER

At a session of this Court held on the 3rd day of November, 2003, at the Kent County Courthouse, Grand Rapids, Michigan.

Before the Court is the defendant's appeal of his conviction and sentence following a jury trial on charges of violation of MCL 750.335a, a Statute commonly referred to as the Indecent Exposure Statute for the State of Michigan. For the reasons set forth in this Opinion the conviction and sentence are AFFIRMED.

The conviction arises out of defendant's intentional and

knowing exposure for three minutes to over 46,000 homes in the greater Grand Rapids area of his or another person's penis and testicles on public access television. The defendant's appeal from the District Court is of right.

I. PROCEDURAL HISTORY OF THE CASE

The procedural history of this case is as follows. The charges against this defendant were brought to fruition when the case was filed on June 1, 2000. On that same day an arrest warrant was issued charging the defendant with having violated the Indecent Exposure Statute on or about April 7, 2000. The defendant was arraigned on that same day and pled not guilty. At that time a personal recognizance bond was ordered and a pretrial conference was scheduled. On June 28, 2000 a pretrial conference was held and on August 24, 2000 a hearing was conducted regarding any possible settlement of the case as is the practice in the 61st District Court. On August 24, 2000 a notice to appear was issued and sent to the defendant. On September 8, 2000 attorney Stephan Savickas was appointed to represent the defendant. On October 19, 2000 a hearing was conducted and subsequent hearings were scheduled for November 28, 2000 and March 26, 2001.

On February 9, 2001 defendant filed a Motion to Dismiss or alternatively an Evidentiary Hearing arguing MCL 750.335a did not apply to nudity in cable television programming; that on its face MCL 750.335a violated the United States and Michigan Constitutions because the statute was over-broad, vague and denied defendant of the equal protection of the law. Additionally, defendant argued his conduct was not obscene and, therefore, the airing of the images on a cable program was protected speech. This motion was supported by an eighteen page memorandum with ten pages of attachments.

On April 9, 2001, the prosecution filed a thirteen page response to defendant's motion and brief seeking dismissal or

an evidentiary hearing.

On June 6, 2001, the defendant filed a nine page rebuttal pleading to the prosecution's answer.

On August 28, 2001, the Honorable J. Michael Christensen issued a fourteen page opinion, attached to this opinion as Appendix A, denying defendant's motion. On October 11, 2001, Judge Christensen issued a one page order denying defendant's motion.

On October 31, 2001 defendant filed an Application Seeking Leave for Interlocutory Appeal to the Circuit Court pursuant to MCR 7.103(B)(1) with a fourteen page brief attached. On December 14, 2001, the Honorable H. David Soet, Judge of the 17th Circuit Court, granted leave to appeal. On January 18, 2002 defendant filed his papers, twenty pages in length, interlocutory, seeking reversal of Judge Christensen's denial of his Motion to Dismiss and substantively again, alleging all of the constitutional infirmities that he raised before the District Court. The prosecution filed its thirteen page responsive pleading on March 1, 2002.

On April 30, 2002, oral argument was held on defendant's interlocutory appeal. Judge Soet denied the appeal[1] and ordered the case remanded for further proceedings. At no time has defendant ever sought to have the Michigan Court of Appeals review pursuant to MCR 7.205 the April 30, 2002 decision of Judge Soet.

On December 2, 2002 defendant filed in the District Court a Motion to Reconsider the denial of the previous dismissal motion. Defendant filed on December 18, 2002 a response brief to the prosecutor's answer to the Motion to Reconsider.

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[1] The transcript of the appellate proceedings and Judge Soet's ruling are attached to this Opinion as Appendix B.

These requests were denied.

Defendant's jury trial took place on January 7, 2003. The jury, after receiving the evidence and hearing the Court's instructions deliberated for approximately one hour before returning a verdict of guilty.

The defendant was sentenced on February 19, 2003 to a term of twelve months Probation with conditions.

It is from this conviction and sentence the defendant appeals.

II. FACTS

Defendant is an adult resident of Kent County, Michigan. As either an avocation or a hobby, he has, prior to April 7, 2000, filmed himself and made videos of these filmings and thereafter provided them directly, independently, to the Offices of the Community Media Center, at Grand Rapids Television (GRTV).[2]

GRTV operates public access programs which allow everyday citizens the opportunity to submit tapes for airing to the cable television subscribers in the City of Grand Rapids. A producer, such as defendant was in this case, signs what is described as a legal document taking full responsibility for their program.[3]

On April 7, 2000, Episode 68 of "Tims Area of Control" was broadcast as part of the defendant's "regular GRTV series" (see page one of exhibit). The video tape which accompanied the application was a thirty minute episode including the three minute "Dick Smart" portion.

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[2] See Trial Transcript, January 7, 2003, pp 39, 45 and Exhibit from trial, "GRTV Application for Cablecast & Statement of Compliance" dated March 30, 2000 and signed by defendant.

[3] Trial Transcript, pp 39-40.

On April 7, 2000, the defendant, for three minutes, had broadcast, through his actions, to at least 46,000 households the naked image of his or someone else's penis and testicles.[4] The image takes up the entire screen of whatever standard monitor one is observing this tape from.

Simultaneous with the open viewing of this sex organ is a voice-over, similar in sound to defendant's voice elsewhere on the tape, that tells what have been characterized as jokes.

The evidence at trial clearly showed defendant and the defendant alone produced the tape that was provided to GRTV for public display. The evidence strongly indicated the defendant was the person filmed in every scene of the tape and that it was his own sex organs that were displayed for three minutes with voice-over. The evidence also shows that the defendant and the defendant alone provided the tape to GRTV and that at the time he provided it the defendant knew it would be broadcast in its entirety, unedited and without warnings into at least 46,000 homes[5] in Grand Rapids, Michigan.

The defendant also knew the display of the sex organs was inappropriate for children. This is demonstrated by the fact that before the episode aired, defendant placed a phone call to where he knew his own children would be and instructed them to "not

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[4] The evidence at trial strongly indicated that the penis and testicles displayed in the defendant's show were his own. The direct testimony of Cornelia Koslek indicated the defendant described putting markings on his sexual organs, draping himself or making a hole in material and then shrouding himself and then using words that could be taken two ways. The manner of which, how the defendant described exposing himself to Ms. Koslek is identical to the manner in which the penis and testicles shown in the tape provided by the defendant to GRTV in "Episode 68" took place for the three straight minutes of the display of the sex organs in the video tape.

[5] See Trial Transcript p 56.

to let the boys watch it, because its more for adults."[6]

On April 7, 2000 the video tape provided by the defendant was broadcast from 71 l Bridge Street NW in the City of Grand Rapids.

The exposure of the defendant's penis and testicles or someone's whom he filmed penis and testicles were observed by a complaining witness. That witness contacted the prosecutor's office. The case was eventually charged. During the time period preceding the trial, the defendant sought and obtained interlocutory review as discussed, *supra*. Following this interlocutory review Judge Soet denied the relief defendant sought. Defendant never appealed that decision but rather chose to go back to the trial Court; file and argue more motions; sought further reconsideration of constitutional claims by Judge Christensen; fully contested the facts; lost at trial before a jury; was convicted and sentenced.

It is this conviction and sentence the defendant now appeals to this Court.

III. ANALYSIS

A. Constitutional Challenges and the Law of the Case Doctrine

1. The Law of the Case Doctrine

The defendant challenges in this appeal the constitutionality of MCL 750.335a as applied to his conduct, his conviction by jury and his sentence.

MCL 750.335a provides in pertinent part:

> "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of

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[6] See Trial Transcript, p 76, testimony of Ronald L. Sukstas.

> a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00..."

This defendant has previously appealed the District Court's Opinion, found at Appendix A of this Opinion to the Circuit Court. The Circuit Court, the Honorable H. David Soet, in the Opinion found at Appendix B denied that appeal. At no time has the defendant sought review by the Michigan Court of Appeals of Judge Soet's decision.

In Michigan, the District Court is the trial Court for misdemeanor charges. The Circuit Court is the appellate Court for decisions made in the District Court. MCR 7.205 allows a party such as the defendant to seek review in the Court of Appeals of decisions such as those issued by Judge Soet in this case.

In the instant case, the defendant did not seek such a review, but rather chose to go back to the District Court, seek further review by the District Court Judge and to zealously defend the charge before a pettit jury. In the District Court the defendant was convicted. He now seeks to re-litigate the issues of the constitutionality of his prosecution under MCL 750.335a, raising essentially the same arguments he has raised three times previously [7], relying on nearly identical arguments and most of the same cases.

There exists in American jurisprudence a concept known as "The Law of the Case Doctrine".

In *Grievance Administrator v Lopatin*, 462 Mich 235 (2000) the Michigan Supreme Court wrote:

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[7] The first motion to dismiss in the District Court; the second, on the appeal of the denial of the motion by the Circuit Court; and the third, the Motion for Reconsideration in the District Court.

> Under the law of the case doctrine, "if an appellate Court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate Court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co. v Saginaw Twp.*, 410 Mich. 428, 454, 302 N.W.2d 164 (1981). [FN26] The appellate Court's decision likewise binds lower tribunal because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate Court. *Sokel v. Nickoli*, 356 Mich. 460, 465, 97 N.W.2d 1 (1959). Thus, as a general rule, an appellate Court's determination of an issue in a case binds lower tribunals on remand **and the appellate Court in subsequent appeals**. *Webb v. Smith (After Second Remand)*, 224 Mich App 203, 209, 568 N.W.2d 378 (1997); see, generally, 5 Am.Jur. 2d, Appellate Review, § 605, p. 300. (Emphasis added.)

462 Mich at 261. In Footnote 26, the Court wrote:

> The "doctrine exists primarily to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 109, 476 N.W. 112 (1991), quoting 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4478, p. 788. It is premised on A need for finality of judgment and the want of jurisdiction of an appellate Court to modify its judgment except on rehearing, *Johnson v. White*, 430 Mich. 47, 53, 420 N.W.2d 87 (1988). *Id.*

In his comprehensive treatise on Michigan Law and Practice, the Honorable J. Richard Johnson of the Ninth Judicial Circuit in Kalamazoo County writes:

> Under the law of the Case Doctrine, an appellate Court ruling on a legal question binds lower tribunals in subsequent proceedings. *International Union, United Automobile, Aerospace and Agricultural Workers, UAW, Local 6000 v State of Michigan*, 211 Mich App 20, 24-25 (1995); *CAF Investment v Saginaw Township*, 410 Mich 428 (1981), *People v Prophet*, 110 Mich App 618, 625 (1980), and *Poirier v Grand Blanc Township (After Remand)*, 192 Mich App 539 (1992), *lv app den*, 441 Mich 931 (1992).
>
> The law of the case doctrine holds that a ruling by an appellate Court on a particular issue binds the appellate Court and all lower tribunals with respect to that issue. *Drive v. Haney (After Remand)*, 226 Mich App 558,565 (1997). Thus, a question of law decided by an appellate Court will not be decided differently on remand or in a subsequent appeal in the same case. *Id.* However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Freeman v DEC Int'l.*, 212 Mich App 34, 38 (1995). For this exception to apply, the change of law must occur after the initial decision of the appellate Court. *Id.* Whether the law of the case applies is a question of law subject to review de novo. *Kalamazoo v. Dep't of Corrections (After Remand)*, 229 Mich App 132, 135 (1998); *Ashker v. Ford Motor Co.*,

245 Mich App 9, 13 (2001).[8]

While it is true *People v Wells*, 103 Mich app 455 (1981) and *People v Herrera*, 204 Mich App 333 (1993) indicate the law of the case "is not inflexible and need not be applied to create an injustice or where a prior decision is clearly erroneous," *Wells*, 103 Mich App at 463, they are distinguishable from the case at bar. In *Wells* the first trial Court made a clearly erroneous ruling holding a confession could only be used for a limited purpose. That ruling was not an issue in the initial appeal. As a result, on retrial, when the subsequent trial judge concluded the statement could be used for broader purposes than the first; the Court of Appeals in reviewing the case did not find the subsequent trial judge violated the law of the case doctrine. Id.

In *Herrera* the Court dealt with the imposition of sanctions on a *pro se* criminal defendant in post-conviction collateral review of his underlying conviction. There the Court of Appeals chose not to apply the law of the case doctrine as it related to the imposition of sanctions.

In its opinion, the Court of Appeals stated that fines were not permissible under 2.114(E). However, it noted that "in criminal cases, the law of the case doctrine does not automatically doom the plaintiff's arguments..." *Id.* at 341. The Court of Appeals stated that had sanctions been available, the decision to impose them "could have been independently reversed because the defendant was not afforded rudimentary due process before being sanctioned..." *Id.* Thus, *Herrera* appears to stand for the proposition that if due process is lacking the law of the case doctrine would not prevent the

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[8] Benchbook for Michigan Circuit Court Judges, J. Richard Johnson, Circuit Judge, 2002, p 176.

defendant from revisiting the issue. This case can be immediately distinguished from the case at bar. In the instant matter, the defendant is not arguing that there exists any deficiency of due process. In fact, the defendant has been afforded a full jury trial and review of that decision. It appears, therefore, that defendant's reliance on *Herrera* is misplaced.

These cases may be further contrasted to the instant appeal in that here the defendant raises what are essentially identical challenges to the legitimacy of his prosecution. In the instant case, the facts are identical at each stage of the appellate litigation; now as they were in the defendant's previous appeal. In the instant case, the defendant challenges the statute of conviction as applied to him as constitutionally defective because of over breadth and vagueness as he has done in all of his previous challenges and appeals.

The single exception to the redundancy of issues in this case is the defendant's assertion that he should not be prosecuted under MCL 750.335a because MCL 750.38 exists.

This additional statute provides:

> Sec. 38. DISPLAYING, ETC., PICTURES, ETC., REPRESENTING PERSONAL VIOLENCE OR HUMAN FORM--Any person who shall post, place or display on any sign board, bill board, fence, building, sidewalk, or other object, or in any street, road or other public place, any sign, picture, printing or other representation of murder, assassination, stabbing, fighting or of any personal violence, or of the commission of any crime, or any representation of the human form in an attitude or dress which would be indecent in the case of a living person, if such person so appeared in any public street, square or highway, shall be guilty of a misdemeanor.

The defendant argues that because this statute applies to representations of the human form, it was improper to prosecute the defendant in this case under MCL 750.355a. Because the prosecution has broad discretion in determining which statute to charge, absent an abuse of discretion, the specific statute selected will not give rise to a successful challenge on appeal. See *People v Ford*, 417 Mich 66, 92 (1982).

Because the defendant chose not to seek interlocutory review of his previously raised constitutional challenges, the law of the case doctrine proscribes his ability to do so at this juncture. To hold otherwise would reward a party who seeks review, looses, then seeks to proffer his case to a trier of fact making all trial arguments and then upon these efforts being unsuccessful yet again seeking appellate review. This practice is contrary to the long standing principals of issue ajudication as are reflected in *Attorney Grievance v Lopatin*. Such a decision would lead to the constant and endless re-litigation of issues indefinitely and give no finality of judgment to any party. This result is contrary to the proper rule of law; would undermine significantly the confidence of parties and the public in rulings of courts and would materially increase the cost, length and uncertainty involved in litigation.

Our system of jurisprudence works because the participants in the process follow the substantive and procedural rules. The defendant in this case was free to seek interlocutory to view of the District Court's Opinion found at Appendix A. When he did, however, and lost[9] it was then incumbent upon the defendant to seek further review of that decision by the Michigan Court of Appeals or to be bound to it forever. When defendant failed to seek further review and instead to go back and try the case to the jury, he abandoned the constitutional

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[9] See Appendix B.

challenges he now seeks to raise again in this Court.

For the reasons stated above the law of the case doctrine proscribes this defendant from raising these constitutional challenges a further time.

2. Constitutional Challenges to MCL 750.335a as Applied to this Defendant

Assuming, *arguendo*, the law of the case doctrine did not bar the re-litigation of these issues the defendant would nonetheless still be unable to prevail in his constitutional challenges to his prosecution under MCL 750.335a for the reasons set forth below.

MCL 750.355a [10]proscribes the open or indecent exposure of ones self or another. The defendant argues the statute does not apply to his conduct because his conduct did not occur in an open place; because the statute is vague and over broad and because if the statute applies to defendant's conduct it violates the First and Fourteenth Amendments of the United States Constitution.

Regarding whether the conduct of the defendant happened in an open place; the record clearly demonstrates that the defendant, through his conduct exposed either his own or another's penis and testicles to 46,000 homes in the City of Grand Rapids, Michigan. He did this by providing the video

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[10] 750.335a. in its entirety provides:

"Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record."

tape of Episode 68 to GRTV located at 711 Bridge St., NW, Grand Rapids, Michigan and requesting them to air the video tape and by doing so defendant knowingly, intentionally and deliberately exposed his or another's penis and testicles to the 46,000 television subscribers in the City of Grand Rapids alone.

The defendant argues this prosecution is unprecedented in the nation. While that may or may not be the case, it is equally possible, that no other person in the nation has ever tried to directly have placed in the homes of totally unsuspecting citizens of an entire metropolitan area a viewing for three uninterrupted minutes a close-up image of a person's genitals.

If there has ever been such a display in any state or commonwealth in the land, the Court can only assume that in the thoughtful and well researched pleadings that have been submitted by the defendant on this appeal and by the amicus brief submitters that this fact or facts would have certainly been brought to the attention of the Court yet they were not. While the prosecution of the defendant may be unprecedented it is equally possible, that the conduct of the defendant giving rise to the prosecution is also unprecedented.

Nonetheless, an analysis of the proper scope of the applicability of the statute at issue is still appropriate.

The statute at issue makes it unlawful to knowingly make **any** open or indecent exposure of one's person or the person of another. MCL 750.335a (emphasis added). The language of statutes are to be given their plain and ordinary meanings. *People vs Aldrich*, 246 Mich App 101 (2001).

Webster's New College Dictionary 1995, defines "any" as follows:

> **1.** One or some, regardless of sort, quantity or number **2.a.** One or another selected at random **b.** One or another without restriction or

> exception . . ., *pronoun* **1.** Any one or ones among three or more **2.** Any quantity or part . . . *adv* To any degree or extent. Id. At p. 51.

"Open" is defined as:

> **1.a.** Affording unobstructed entrance or exit **b.** Affording Unobstructed passage or view . . .
>
> **Syns 1.** open, exposed, uncovered, unprotected *adj. core meaning*: having no protective or concealing cover. Id. at 766.

In analyzing the applicability of this statute, the Michigan Court of Appeals has concluded that there is no requirement that defendant's exposure actually be witnessed by another person to constitute "open or indecent exposure," within the meaning of the indecent exposure statute, as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *People v. Vronko* (1998) 579 N.W.2d 138, 228 Mich. App. 649, appeal denied 590 N.W.2d 66, 459 Mich. 945.

Likewise prosecution for indecent exposure has not been barred simply because charged conduct was performed before a theater audience which was comprised primarily or even totally of consenting adults. *People v. Wilson* (1980) 291 N.W.2d 73, 95 Mich. App. 440.

In *Vronko*, the court concluded that the indecent exposure statute provided fair notice to defendant that the act of exposing one's penis and masturbating while seated in an automobile parked on a public street with its window open was conduct proscribed by statute and did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense had been committed in the context of the charged conduct; therefore, the statute was not unconstitutionally vague as applied to defendant. *Id.*

In analyzing the statute, the court wrote:

> With respect to the common uses of the words contained in the statute, *Webster's New Collegiate Dictionary* (1977) defines "open," in part, as being "exposed to general view or knowledge," "having no protective covering," and "to disclose or expose to view." Likewise, the word "exposure" is defined as meaning a "disclosure to view" especially of "a weakness of something shameful or criminal." *Id.* "Indecent" is defined as "grossly unseemly or offensive to manners or morals." *Id.* Finally, "indecent exposure" is defined as being an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community." *Id.* Given these definitions and judicial constructions, the language of the indecent exposure statute (1) provided fair notice to defendant that the act of exposing one's penis and masturbating while seated in an automobile parked on a public street with its window open was conduct proscribed by the statute, and (2) did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed in the context of the charged conduct. Therefore, we hold that the indecent exposure statute was not unconstitutionally vague as applied to defendant. *Hubbard, supra* at 484, 552 N.W.2d 493. *Id.* at 653-654.

Finally, in comparing the statutory analysis with the common law, the *Vronko* court cited with approval former Michigan Supreme Court Justice Boyle's concurring opinion in

In re Certified Question, 420 Mich 51, 63, 359 N.W.2d 513 (1984) where she [d]efined "open exposure" under the indecent exposure statute as being "any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended." According to Justice Boyle,

> "[t]his standard would require evaluation of the setting in which the exposure took place in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended by what was seen." *Id.* Justice Boyle's definition, although not binding on this Court, is consistent with the common-law interpretation of the offense, and nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation of the offense, and nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation. For these reasons, we hold that there is no requirement that the defendant's exposure actually be witnessed by another person in order to constitute "open or indecent exposure," as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *Vronko* at 656.

Applying these standards and definitions to the facts at bar it is patently clear that the intentional provision of the video tape and the causing of it to be displayed openly to thousands upon thousands of homes in the City of Grand Rapids, and many more thousands of homes in the outlying communities near Grand Rapids in Kent County meets the statutory

definition of "any open or indecent exposure of his or her person or of the person of another."

The constitutional challenges made by the defendant and his reliance on *Erznoznik v City of Jacksonville*, 422 US 205 (1975) and *United States v Playboy Entertainment Group, Inc.* 529 US 803 (2000) are unavailing.

In *Erznoznik*, the Court struck down a Jacksonville ordinance which made any employee or any person connected with a drive-in theater that exhibited any movie which displayed the human male or female buttocks, the female breasts or human bare pubic areas, if the display is visible from any public street or place, guilty of a misdemeanor. *Erznoznik* at 207. The Court found this Ordinance to be far too broad to survive constitutional scrutiny. In commenting on what a legislative body may do, however, the Court wrote, "It is well settled a State or a Municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Id.* at 212.

In the instant case, the challenged statute does not per se criminalize all exposure but only indecent exposure. Likewise, when instructing the jury below, the trial Judge properly instructed that they "must decide whether the act was improper and indecent according to community standards of decency and morality." (Record of trial, p. 145). In *Erznoznik* the stricken ordinance had no such requirement and anyone, specifically including even a ticket seller was per se guilty of a misdemeanor if any of the proscribed areas of the human body were displayed no matter the length of time, content or other potentially relevant and mitigating factors. This the Court found to be too broad.

The instant case and facts are significantly different from those in *Erznoznik*. Here defendant produced, filmed, displayed, distributed and exposed for three uninterrupted

minutes his or another's penis and testicles. The jury was properly instructed as to all elements of the statute and after deliberating concluded the defendant had violated the statute.[11]

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[11] Judge Christensen's instructions regarding the elements of the charged offense were as follows:

To prove this crime, the prosecution must prove each of the following elements beyond a reasonable doubt: First, the defendant exposed his penis or the penis of another; second, that the defendant knew he was exposing his penis or the penis of another; third, that the defendant did this in a public place in which another person in the public may have been expected to observe this; fourth, that the defendant did this on April 7th of the year 2000 here in the City of Grand Rapids; fifth, if you find that the act was committed, you must decide whether the act was improper and indecent according to community standards of decency and morality. In determining this, you must think about the nature of the act, and all the circumstances surrounding the act.

One of the elements of the crime of indecent exposure is that the exposure be in a public place. This does not require that the exposure be done in person. An exposure is done in a public place if it is done in such a way, that is reas -- that it is reasonable to believe that someone in the public may have been accepted (sic) expected to observe it and be offended by it.

I'll re-read that, because I made two mistakes while I was reading it.

One of the elements of the crime of indecent exposure is that the exposure be in a public place. This does not require that the exposure be done in person. An exposure is done in a public place if it is done in such a way, that it is reasonable to believe that someone in the public may have been expected to observe it and be offended by it.

If you find beyond a reasonable doubt that the defendant videotaped his penis, or the penis of another, and submitted the videotape to a public access television station, that the station, in fact, ran the videotape, and that someone in the public would reasonably be expected to observe this, this would establish the element that this be done in a public place.

This crime of indecent exposure requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did these acts with the intent to cause a particular result. For the crime of indecent exposure, this means that the prosecution must prove

In *United States v Playboy Entertainment Group, Inc.*, 529 US 803 (2000), also relied on by the defendant, the Court struck down §505 of the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 136, 47 USC § 561 (1994 Ed., Supp. III) which required cable television operators who provided channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or fully block" those channels or to limit their transmission to hours when children are unlikely to be viewing. The Court found §505 was content-based speech restriction that could stand only if it met strict scrutiny requirements.

In the case at bar, MCL 750.335a proscribes conduct. It is not a statute that in broad and all encompassing language proscribes protected speech. It is rather like the Indiana statute at issue in *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991) a proper limitation of conduct pursuant to the analysis required by *United States v O'Brien*, 391 US 367 (1968).

In *O'Brien*, cited by all parties in their submissions to this court in the instant case; the Supreme Court of the United States upheld the conviction of a defendant in an event related to his burning of his draft card during the height of the Viet Nam War. *O'Brien* claimed his conviction was violative of the First Amendment. The court rejected this argument as applied to symbolic speech stating:

> (E)ven on the assumption that the alleged communicative element in O'Brien's conduct is

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that the defendant intended to expose his penis or the penis of another. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in this case.

The facts -- or the evidence must convince you beyond a reasonable doubt that the crime occurred in the City of Grand Rapids. Record of Trial, pp 145-146.

> sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376-377, 88 S.Ct., at 1678-1679 (footnotes omitted).

In *Barnes* the Supreme Court upheld an Indiana Public Indecency Statute, applying *O'Brien*. There, the Court wrote:

> Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is possible

> to discern, other than form the text of the statute, exactly what the governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common-law roots of the offense of "gross and open indecency" in *Winters v New York*, 333 US 507,515, 68 S Ct 665, 670, 92 L.Ed. 840 (1948). Public nudity was considered an act *malum in se*. *Le Roy v Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (KB 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places. *Barnes* at pp 567 568.

A similar conclusion results in the instant case. The statute of conviction in the instant case proscribes the *conduct* the defendant engaged in, not his speech.

Barnes, *O'Brien* and the Michigan Indecent Exposure Statute all have one critical element in common. They all deal with the regulation of proscribed conduct. Juxtaposed to this the *Playboy* case dealt with a regulation by the federal legislature of the media; the press; by its very language.[12] The

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[12] Additionally, it should be noted, the procedural context of *Playboy* was dramatically different from the matter at bar. In that case; the appellee, Playboy Entertainment Group, when becoming aware of §505 sought injunctive relief; immediately preserving all of their rights and properly

statute at bar has no such facial infirmities.

Additionally, *Schad v Borough of Mount Ephraim*, 452 US 61 (1981) is distinguishable from the instant case. In *Schad*, the Court set aside an ordinance which excluded all live entertainment in the municipality, including plays, concerts and musicals. 452 US at 67. These proscriptions were simply too broad to survive constitutional scrutiny.

At the heart of defendant's challenges is, of course, the First Amendment.

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . ., abridging the freedom of speech or of the press . . ."

The adoption of the Fourteenth Amendment removed any doubt that may have existed as to the applicability of the First Amendment to the several states.

The guarantee of freedom of speech and freedom of the press have consistently been recognized under each of Michigan's Constitutions.

The Constitution of 1835 provided:

Freedom of speech and press.

> 7. Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of

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bringing issues before the appropriate courts. In the instant case on the other hand, the defendant, when facing prosecution under what he has consistently alleged is an unconstitutional statutory scheme, he failed to properly preserve the issues when he abandoned his appeal in 2002 by failing to even petition for additional interlocutory review.

> speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Art. I, §7.

The Constitution of 1850 provided:

Liberty of speech and press.

> Sec. 42. No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right. Art. IV, §42.

The Constitution of 1908 provided:

Liberty of speech and of press

> Sec. 4. Every person may freely speak, write and publish his sentiments on all subject, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. Art. II, §4.

The current Constitution of this State, the Constitution of 1963 provides:

§ 5. Freedom of speech and of press

> Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press. Art I, §5.

As the *Barnes* opinion indicates, indecent exposure statutes have long existed in Anglo-American legislative enactments. These enactments pre-dated the adoption of the United States Constitution by over one hundred years and the first Constitution of the State of Michigan by over one-hundred and seventy years. The enforcement of indecency statutes has peacefully coexisted with the constitutional protections of the press and of speech because it is the prosecution of public conduct not speech that is their hallmark.

Denver Area Educational Telecommunications Consortium v The Federal Communications Commission, 518 US 727 (1996) which characterizes public access channels, such as GRTV, as public fora notes, "[P]ublic fora do not have to be physical gathering places"[13] supports this continued co-existence even when the open place is through public access cable television.

Further buttressing this conclusion is *People v Wilson*, 95 Mich App 440, 442 (1980) where the defendant was a nude dancer at an adult theater in Detroit. She brought a motion to quash her prosecution maintaining that the indecent exposure statute was an invalid infringement on her First Amendment rights, that the statute failed to adequately describe the conduct which was proscribed, that the statute failed to give fair notice and that audience consent nullified the indecent exposure charge.

In *Wilson* the court wrote:

> A prosecution for indecent exposure is not

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[13] That part of the Denver court opinion which set aside portions of the challenged statute does not strengthen defendant's position for the same reason the Playboy decision did not; in both cases the infirm statutory language specifically limited the press and did so in a manner not narrowly enough drawn. Here, the statute simply does not limit the press, but conduct.

> beyond the scope of M.C.L, s 750.335a; M.S.A. s 28.567(1); simply because the charged conduct is performed before a theater audience which is comprised primarily or even totally of consenting adults. *Wilson* at 443.

The majority opinion concluded stating:

> In the present case, the statute is not designed to prohibit speech. Expressive conduct, not pure speech, is regulated and the statute's application to conduct protected by the First Amendment is, at most, minimal. We believe that there are a substantial number of situations to which the statute can validly be applied and that there is no substantial overbreadth. *Broderick*, *supra*, 413 U.S. 615, 93 S.Ct. 2917. Accordingly, we find that the lower court incorrectly granted defendant's motion to quash and we reverse. *Wilson* at 446.

The defendants actions in the instant case, as did the defendant's action in *Wilson*, constituted conduct reasonably and foreseeably proscribed by MCL 750.335a. Applying the statute to defendant's conduct is neither overbroad or overreaching. Neither vexatious nor vague.

The proofs at trial demonstrated the defendant knowingly and intentionally made an open display of his or another's sex organs for three uninterrupted minutes to 46,000 homes in Grand Rapids. It was conduct legitimately and reasonably proscribed by the statute of conviction.

3. Overbreadth and Vagueness Challenges

The defendant asserts that the statute of conviction as applied to him is overbroad. *Wilson*, *supra*, leads this Court to another conclusion. The Michigan Court of Appeals rejected

defendant's overbreadth arguments in that case. That decision is controlling precedent for this Court.

The overbreadth argument is rejected.

The defendant also asserts that the statute of conviction is vague and, therefore, constitutionally infirm. *Vronko*, *supra* rejects this contention and that decision is controlling precedent for this Court.

The vagueness argument is rejected.

B. Additional Trial Errors Alleged by Defendant

1. Exclusion of Evidence of Nudity in Other Television Programs

The defendant asserts that the exclusion of evidence about nudity in other television programs, questions to the complaining witness about what she watched on television and evidence about Federal Communications Commission roles related to safe harbor periods was reversible error.

An appellate court reviews a trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Sabin*, 463 Mich 43, 60 (2000); *People v Aldrich*, 246 Mich App 101, 113 (2001) and *People v Starr*, 457 Mich 490, 494 (1998).

In order to find an abuse of discretion, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will." *Spalding v Spalding*, 355 Mich 382, 384-385 (1959).

A review of the entire record does not show the challenged evidentiary rulings were an abuse of discretion. What was at issue in the instant case was the defendant's conduct, not that of another. Additionally, in his closing argument defendant's counsel, in fact, argued regarding the presence of nudity in other television programs (Record of Trial, p. 128, lines 4-6) as

well as so argued for the jurors to use their common sense in relation to what the import of the evidence of nudity was in this case as compared to their common every day experiences and community standards. (Record of Trial, p. 133, lines 21-25). The trial Judge committed no error in the challenged evidentiary rulings and in the event that they were in error the error was harmless in light of the entire record and cannot serve as a basis to overturn the jury's verdict.

2. Denial of Directed Verdict

A review of a trial Court's denial of a motion for directed verdict is a review de novo of the evidence to determine if the evidence, when examined in the light most favorable to the non-moving party, could satisfy a rationale trier of fact that beyond a reasonable doubt, by admissible proofs, that all the elements of the charged offence were shown. *People v Mayhew*, 236 Mich App 112, 124-125 (1999).

In the matter at bar, the prosecution was required to show the defendant had:

(1) exposed his or another's penis;

(2) the defendant knew he was exposing his or another's penis;

(3) that the defendant did these things in a public place in which another member of the public could reasonably have been expected to observe this;

(4) that the defendant did this on April 7, 2000 in the City of Grand Rapids; and,

(5) that the act committed by the defendant was improper and indecent according to community standards of decency and morality.

The proofs at trial, when considered in the light most favorable to the prosecution satisfy each of the above elements.

Here, the defendant exposed his or another's penis and testicles to over 46,000 homes. He himself produced the device by which the exposure took place and personally submitted it to GRTV for release. He provided the device to GRTV in the City of Grand Rapids. He did all these things knowing it would cause the open exposure to take place on or about April 7, 2000. These actions were improper and indecent as judged by the standards of the community of Grand Rapids, Michigan.

The defendant's argument that his motion for directed verdict was improperly denied is without merit.

3. Jury Instructions

The defendant challenges both the instructions given and argues it is reversible error that defendant's proposed instructions 3(b), (c), (e) and (f) were not given. The defendant argues the Court's instructions amounted to directing a verdict of guilt against the defendant.[14]

It is the function of the, trial court to clearly present the case

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[14] The defendant's proposed instructions were as follows:

Instruction 3(b): "You must first decide whether all of the TV show, taken in its entirely, both the photographs and the audio, were intended by the defendant to convey any idea, thought, or concept. If the whole work, in its entirety, was intended to express an idea, message or concept by the defendant, then you must find the defendant not guilty."

Instruction 3(c): "The prosecution must prove beyond a reasonable doubt that the defendant's performance, taken as a whole, had no expressive or entertainment value of which the nudity was an integral part,..."

Instruction 3(e): "Entertainment may not be prohibited by the criminal law simply because it displays the nude human figure."

Instruction 3(f): "In determining whether defendant's performance has expressive or entertainment value, you must not base your decision on your personal reaction to the performance or whether you find it offensive."

to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310 (2001). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *Id.*

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478 (1989). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freeland*, 178 Mich App 761,766 (1989), *lv app den.* 434 Mich 903, *cert den*, 498 US 853(1990). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481, *lv app den*, 439 Mich 899 (1991).

The trial court committed no error in refusing to give defendant's proposed instructions 3(b) and (c) because simply put, they were erroneous as a matter of law for the reasons set forth *supra*. The defendant would have the Court instruct if his actions were intended to convey **any** idea, thought or concept then the jury must find the defendant not guilty. Similarly, the defendant argued there must be **no** expressive or communicative value. Were this the case, *O'Brien* and *Barnes* would have been decided differently. They were not. The defendant's theory of what the law was and is, was and is mistaken.

The trial Court likewise committed no error when it declined the defendant's request to give 3(e) and (f) because they were incomplete and were not of enough clarity that they would have assisted the jury in this case.

A review of all of the instructions provided to the jury in this case reveals a materially complete statement of the law the jury had a duty to apply and when read as a whole, appropriate.

4. The Failure to Quash the Search Warrant

The defendant asserts that because the first magistrate who was petitioned to issue a search warrant declined to do so the trial Court was obligated to conduct an evidentiary hearing to examine what transpired. What the defendant does not do in this appeal, nor did he do before the trial Court, is assert there was an absence of probably cause.[15] There not being any assertion that there was an absence of probable cause, the trial Judge did not commit error in refusing to grant the evidentiary hearing sought by defendant.

WHEREFORE:

After reviewing the pleadings submitted, the record from the trial Court, all materials related to the previous interlocutory appeal filed by the defendant and the oral arguments of the parties, the Court finds as follows:

1. The law of the case doctrine proscribes this defendant from being able to raise the constitutional challenges he makes to MCL 750.335a and its application to him for the reasons set forth *supra*;

2. Even if the law of the case doctrine did not proscribe the review of these claims, if they were considered substantively, the challenges would be without merit for the reasons set forth *supra*; and

3. The additional assignments of error related to the manner in which the trial Court conducted the trial, denial of a directed verdict, the jury instructions and the failure to quash the search warrant are all without merit.

The defendant in this case was charged with violating MCL

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[15] The primary argument as to this issue appears to be because the underlying conduct is not a crime, there could not be probable cause.

750.335a which makes it unlawful for a person to make any open or indecent exposure of his person or the person of another. He caused, on April 7, 2000, his penis or that of another to be displayed to 46,000 homes in the City of Grand Rapids from a location originating at 711 Bridge Street NW, Grand Rapids, Michigan. For three uninterrupted minutes, with no warning or notice, the full exposure of a man's penis and testicles was sent into all of these 46,000 homes and more.

The conduct was properly prohibited under MCL 750.335a.

The defendant's conviction and sentence are **AFFIRMED**.

/s/

November 3, 2003 James Robert Redford, Circuit Judge

Appendix D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiffs,
v.
TIMOTHY BRUCE HUFFMAN,
Defendant.

TRANSCRIPT OF PROCEEDING
BEFORE THE HONORABLE H. DAVID SOET
Friday, April 30, 2002
Grand Rapids, Michigan

APPEARANCES:

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FOR THE DEFENDANT: Stephan Savickas (P44617)
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Reported by: Shawn M. Breimayer, CSR (6888)

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Witnesses:
(None)

EXHIBITS:
(None marked)

(Commenced at _____)
THE COURT: Okay. People versus Huffman. This is the time for oral argument.
MR SAVICKAS: Good afternoon, your Honor.
THE COURT: Good afternoon.
MR. SAVICKAS: I'm sure you've read the briefs on both sides.
The court: Yes, I have.
MR. SAVICKAS: I'm not going to waste a lot of the Court's time here. The question before the Court is whether the indecent exception criminal statute apply in this case. We feel it is not applicable as the state has propositioned. Obviously, there's a constitutional law here of free speech and the first amendment.
The state's position is that this case has nothing to do with speech. The defense's position is that the case has nothing to do with conduct. There's a common ground here where both sides agree that the indecent exception

statute applies only to conduct, therefore, the first focal point -- the pivotal issue here is for the Court to decide whether this case involves A, speech, B, conduct, or C, the combination of speech and conduct.

Now, at the Supreme Court level, there's no confusion as set forth in the Miller versus California. And, in this case, nude scenes are distinguishable from public

nudity, and in fact, the recent decision by Supreme Court by virtual child porn, which I just got a hold of today -- I have a copy for the Court and the prosecutor to look at if necessary -- are same or similar circumstance.

But, on page 11, I thought made an interesting and relevant statement. The Court's first amendment cases draw vital distinctions between words and deeds between ideas and conduct. That's on page 11. I'll submit this for the Court in case it would like to review it later. So, in this respect, there is no conduct to apply the statute to in this case. There is no constitutional entanglement for the Court to wrangle with.

And also, for guidance, the Justice Kennedy, in his concurring opinion in the Denver case -- and that's the same concurring opinion relied on by the lower court for it's analogy to public forum. It addresses three main topics regarding the constitutionality of cable TV programming. It talks about -- I'll provide that to the Court as well. But there's three main points there. The setting. By that, I mean artistic setting.

Second of all, the category. And we're talking about conduct or speech. Well, Justice Kennedy sets forth that he categorizes it as speech and he sub-classifies it as indecent speech; not indecent conduct. He further explains that indecency is often indivisible from the

message that is being conveyed. In other words, the indecent photographic images are combined with the spoken words, and collectively, it's all speech. Protected speech. If the Court would like, I would recite that passage for the record.

THE COURT: I assume that you're quoting an opinion of the Supreme Court?

MR. SAVICKAS: Yes. I do have a copy for the Court to look at, and I also have one for my distinguished colleague here. Referring to the bottom of page 804; the case. That paragraph I'm referring to on the bottom with the interest of children that are at stake here. These concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech.

There's been a few categories of expression that can be described -- he gives a cite there for defamation and reciting a riot -- we have been reluctant to mark off new categories of speech for diminished constitutional protection. Our hesitancy reflects skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas, a concern heightened here by inextricability of indecency from expression. We cannot indulge the facile assumption that one can forbid particular words without

also running a substantial risk of suppressing ideas in the process. The same is true of forbidding programs indecent in some respect. In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work

by conveying "otherwise inexpressible emotions." In scientific programs the more graphic the depiction, (even to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. That in a nutshell is our argument.

THE COURT: Thank you. You're Mr. Kent?

MR. KENT: Yes, your Honor. Good Afternoon.

THE COURT: Good afternoon.

MR. KENT: I'd like to note that the portion of the Denver opinion that counsel read to the Court was from Justice Kennedy, and that was a plurality decision. And there was -- that text that he was reading does not constitute the law of the case from the Denver decision, and we have set forth our arguments in our brief.

And it's our position that this prosecution is only designed to reach the conduct that took place on the television program. It does not seek to restrict or regulate the speech that he engaged in, but merely the

conduct. And I rely ___est on the arguments in our brief, unless you have any more questions.

THE COURT: Thank you, Mr. Kent. I'll give an opinion from the bench. The first issue we must consider is the standard of review in this case. We conclude, as this case involves not questions of fact as all the facts are essentially stipulated to, but rather constitutional issues raising questions of law we must consider de novo.

People versus Louis 218 Michigan Appellate 447, 451, 1996. I believe this case breaks down into essentially two issues. First of which is whether planning this display by defendant violates his rights under the first

amendment guaranteeing free expression.

The statute which the prosecution attempts to enforce is MCL 750.335A, which reads, "Any person who shall knowingly make an open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than one year or by fine of not more than $500, or if such person was, at the time of said offense, a sexually delinquent person may be punishable by imprisonment in the state prison for an undetermined term. The punishment of which shall be one day, the maximum of which shall be life, provided that any other provision of any other statute notwithstanding said offense shall be

triable in the court of record."

This statute has been upheld in the face of assertions that it was unconstitutional via People versus Vronko 228 Michigan Appellate 649, 652, 654, 1998 application delayed. 459 Michigan 945, (1999). The Court of Appeals in Vronko noted that the case did not implicate first amendment freedoms implying we believe that freedom of speech and expression may be a consideration in an appropriate case. That specifically, we refer counsel to People v Howell 396 Michigan 16, 20, 21, (1996), which notes that same distinction.

We thus must resolve the question of whether this -- while in this case the statute and opinions depend upon defendant's right to free expression. Initially, we find that the statute is aimed at specifically identifiable and easily identifiable conduct as opposed to speech. The prosecution does not assert that anything defendant Huffman said violates any criminal statute. However, some acts may constitute similar speech. For instance, the

flag may express political protest. This case does not resemble that circumstance.

Additionally, speech may, in some circumstances, be combined with conduct. In such instances the conduct still may be suppressed if the statute is within the constitutional power of the state. It further is an

important substantial or government interest. The governmental interest is unrepresented to suppression of free expression and the restriction is no greater than necessary.

US v O'Brien 391 US 367 (1968), this statute meets such criteria prohibiting open displays of body parts, in forensic to reproductive functions, has been repeatedly upheld in this and other states. This state does have a substantial interest in maintaining order by maintaining commonly accepted standards of decency and morality. Such displays are not directly related to the free expression and exchange of ideas.

And, finally, imposition of this law does not restrict first amendment rights any further than necessary to the protection of that interest. We are keenly aware of the limitations that the first amendment imposes on this statute. State's performances such as Old Calcutta are plays written by professionals performed by professional actors and dancers and seen only by persons who choose to pay to see them.

Open nudity and sexually explicit exchange on TV accompanied by warnings of their nature are also accepted presence of fact; works of art. By way of example, Michelangelo's David or Goya's Naked Maja are not expressions of a person; they are stone and canvas, and

they are also works of art which are within the parameters of guarantee of free expression.

Defendant's conduct, on the other hand, bears a strong resemblance to a flasher in a schoolhouse offense. He exposes his penis with a face painted on it, makes a few off color references to it, and tells one not particularly funny joke in the course of a three minute monologue. His performance appeared on Grand Rapids public access cable channel where any member of the public would happen upon it unexpectedly and without warning. Thus, his expression was different than those previously mentioned; it was open to all to see.

Further to describe his performance as artistic does, in my judgment, violate the meaning of the English language, which no court is required to tolerate. There may be circumstances which will present issues of whether a particular body display falls within contemporary community standards relative to public nudity, thus comes within the broad area of the guarantee. That does not appear to be this case.

In such cases presented, it will present a fact question for a jury to determine upon proper instructions relative to constitutional guarantees. The second issue of the case is whether this statute applies to other than personal physical exposures. The defendant asserts that

it does not apply to his performance because it was videotaped. He asserts that the statute does not apply to television programming. We consider this to be the essential serious issue in this case.

Our Supreme Court stresses the need to interpret the statute according to their language. While we can find no

statute which the statute interprets, which is why a video tape is a series of photographs creating a moving image of the subject, we can find nothing in the law passed by the legislature which excludes it. It is, at least, interesting, if not perhaps instructive, to note that the law specifically applies not only to persons who expose themselves, but to anyone who exposes another person. This may suggest that the law was intended to have a somewhat broader scope.

Of course, we have pointed to examples in which the first amendment are present, legal or factual issues for determination by a Court or jury in appropriate cases. Defendant's appeal is denied and the decision of the District Court is affirmed. And the case is remanded for further proceedings not inconsistent with this opinion. Thank you, gentlemen.

STATE OF MICHIGAN)
) SS.
COUNTY OF KENT)

I certify that this transcript, consisting of 12 pages, is a complete, true and correct transcript of the proceeding held in this case on Friday, April 30, 2002.

Dated: June 3, 2002

/s/
Shawn M. Breimayer, CSR

Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-04

Appendix E

STATE OF MICHIGAN

IN THE DISTRICT COURT, 61ST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

District No.: 2000-SM-1326

vs.

TIMOTHY BRUCE HUFFMAN,

Defendant.

_____/

OPINION

BY THE HONORABLE MICHAEL CHRISTENSEN, DISTRICT JUDGE

Grand Rapids, Michigan - Tuesday, August 27, 2001

APPEARANCES:

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This is Defendant's Motion to Dismiss. The Court has received several briefs from both Parties and one videotape of the event in question. No oral arguments were allowed.

Defendant's Motion to Dismiss is denied.

FACTS

Defendant was arrested for violation of the indecent exposure statute, MCL §750.335a; MSA §28.567(l), after exposing his penis on GRTV, a local public access television channel. On April 7, 2000, the Defendant was the producer for "Episode 68" which contained music and comedy skits. During this program, the Defendant exposed his penis, which was marked with facial features, and referred to as "Dick Smart" in a so-called comedy skit whereby "Dick Smart" recites jokes. No other part of Defendant's body was visible during this segment which lasted approximately three minutes.

LAW AND ARGUMENT

Defendant contends that the indecent exposure charge against him should be dismissed. In support of this contention, Defendant argues that the indecent exposure statute, MCL §750.335a; MSA §28.567(1), is not applicable to nudity in cable television programming. Defendant also argues that the statute violates his First Amendment freedom of speech right and, in the alternative, that it is facially unconstitutional because of vagueness and overbreadth. This Court concludes that the indecent exposure statute is, in fact, applicable to nudity in cable programming and that the statute is constitutional. Therefore, this Court denies Defendant's Motion to Dismiss.

Defendant argues that the indecent exposure statute was not intended to apply to nudity on television and, therefore, his conduct does not fall within the parameters of the statute. Defendant further contends that the statute only applies to in-

person conduct. However, the plain language of the statute does not make any reference to the requirement of a witness or, rather, "in-person conduct." The provision on indecent exposure states, in part, that "any person who shall knowingly make any *open or indecent exposure* of his or her person or of the person of another shall be guilty of a misdemeanor." MCL §750.335a; MSA § 28.567(1). (Emphasis added.) "Indecent exposure is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." *People v Vronko*, 228 Mich Appropriate 649, 653; 579 NW2d 138, 140-141 (1998), citing *People v. Kratz*, 230 Mich 334, 337; 203 N.W.2d 114 (1925). (1925). Clearly, Defendant's display of his penis in such a manner as the present situation can be characterized as "indecent exposure."

In *People v Vronko*, the Court of Appeals of Michigan concluded that there was "no requirement that the defendant's exposure actually be witnessed by another person in order to constitute 'open or indecent exposure.'" *Id.* at 657. The Defendant incorrectly states case law when he states that the indecent exposure statute has been applied only to in-person conduct. In *Vronko*, the "witness" saw defendant seated in his parked vehicle with his legs bare and his hand in his crotch but did not actually see defendant's penis. The Court of Appeals' decision was consistent with the common law approach, which also did not require that the indecent exposure be observed but only that the proscribed conduct occur in a public place. *Id.* at 655-656, citing *3 Wharton's Criminal Law*, (15th ed.), § 308, p. 196-200, citing *State v Martin*, 125 Iowa 715; 101 NW 637 (1904); *Van Houten v State*, 46 NJL 16 (1884); *State v Roper*, 18 NC 208 (1835); *State v Buffano*, 5 NJ Super 255, 257; 68 A.2d 765 (1949).

Michigan Supreme Court Justice Boyle, in her concurrence *In re Certified Question*, 420 Mich 51, 63; 359 NW2d 513 (1984), concluded that "open exposure" and "indecent exposure" were separate kinds of behavior, proscribing different kinds of conduct. Justice Boyle stated that definition of "open exposure" meant that "any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended" was prohibited. *Id.* at 63. Accordingly, "this standard would require an evaluation of the setting ... in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended...." *Id.* at 63.

Applying these standards to the instant case, there is no requirement that defendant's exposure of his penis must be made in-person. Clearly, his exposure was "open" because it was reasonable to believe that someone may have been expected to observe it and thus be offended by it. Merely because Defendant's conduct appeared on a public access television channel does not provide him with immunity from the indecent exposure statute. Justice Kennedy, in his concurring opinion, in *Denver Area Educational Telecommunications Consortium, Inc. et all right v FCC, et all right*, 518 US 727; 116 S. Court 2374 (1996), stated that a public access channel, like GRTV Channel 25 in the case at bar, is a public forum. In following this characterization, Defendant's conduct, namely his exposure, occurred in a public place within the meaning of the indecent exposure statute and subsequent case law. Therefore, the indecent exposure statute is applicable to Defendant's exposure on the public access channel.

Defendant's next argument is that the indecent exposure statute, as applied to this case, is unconstitutional because it

violates his First and Fourteenth Amendment rights. Defendant contends, erroneously, that the statute is a content-based restriction upon speech. The indecent exposure statute is, however, a content-neutral regulation. The statute is aimed not at the communicative impact of the expression but rather is aimed at some evil unconnected with the speech's content, namely the "open or indecent exposure" of a person. The statute, as applied to the facts of this case, merely has an incidental suppression of expression. *United States v O'Brien*, 391 US 367; 88 S. Court 1673 (1968).

"When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the 'nonspeech' element can justify incidental limitations." *Id.* at 377. The Supreme Court in *O'Brien* also put forth a four-part test to determine the constitutionality of a regulation on non-speech expression:

> A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 US 367, 377.

The statute promotes an important governmental interest: the protection of public order and morality. *See Barnes v Glen Theatre Inc.*, 501 US 560; 111 S. Court 2456 (1991), where the United States Supreme Court upheld a ban on nude dancing stating that the government's interest in protecting order and morality outweighed the slight infringement on the

dancers' free expression. The indecent exposure statute, as stated above, was not designed to impinge upon a person's conduct. Expressive conduct, not pure speech is regulated, and the statute's application to conduct protected by the First Amendment is, at most, minimal. *People v Wilson*, 95 Mich Appropriate 440; 291 NW2d 73 (1980); *Plymouth Township v Hancock*, 236 Mich Appropriate 197; 600 NW2d 380 (1999). As stated above, the statute is not aimed at suppressing one's first Amendment freedom of speech. Instead, the statute is aimed at the prevention of the "exhibition of private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." *Vronko*, 228 Mich Appropriate 649 at 653.

The statute has nothing to do with the content of Defendant's or anyone else's speech. The Defendant has been not been punished because of the ideas or the information contained in his comedy skit, but rather for the conduct - the "open or indecent exposure" of his penis to the public. "The First Amendment does not protect nonsymbolic, nonverbal conduct which has no speech element" and hence Defendant's exposure of his penis is not entitled to First Amendment protection. *People v Wilson*, 95 Mich Appropriate 440, 74, 291 NW2d 73 (1980). If an anti-war activist breaks a window of an induction center protesting against the draft, a state should be able to punish said activist for this crime because although the act may be expressive, the harm which the state seeks to prevent does not flow from the content of the message. Simply stated, Defendant is not prohibited from performing his "comedy skit" in the future, but is, however, regulated in the manner in which he performs that routine.

Defendant's analogy of the case at bar to the ordinance in *Erznoznik v Jacksonville*, 422 US 205; 95 S. Court 2268

(1975), and the network broadcast of *Schindler's List* is misguided. The municipal ordinance in *Erznoznik* made it a public nuisance and a punishable offense for a drive-in movie theater to show films containing nudity when the movie screen was visible from a public street. The United States Supreme Court held that the ordinance was unconstitutional as a *content-based* restriction on the freedom of speech, and that the ordinance discriminated among movies solely on the basis of content. *Erznoznik*, 422 US 205, 208-212. (Emphasis added.)

The Supreme Court went on to state further that "scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Erznoznik*, 422 US 205, 211, n7, citing *Miller v California*, 413 US 15; 94 S. Court 2750 (1973). Defendant's analogy of his present situation to *Schindler's List*, which did contain full frontal nudity of both men and women in its broadcast, is weak. *Schindler's List*, is a historic documentation which shows the nudity of men and women in the context of their lives in death camps. Schindler's List also contained a warning at the beginning of the network broadcast warning viewers of the nudity. On the contrary, Defendant's program contained no such warning of nudity and consisted of three minutes of a prolonged, up-close focus on the genitals, which had a face drawn on, and this is all the viewer was able to see. A voice in the background told jokes and stories, all the while making it seem as though the penis was doing the talking. Defendant's attempt to justify his indecent exposure on a public access cable television channel as protected expression is without merit and, therefore, this Court finds that the Michigan indecent exposure statute does not violate Defendant's First or Fourteenth Amendment rights.

Defendant's next argument is that the Michigan indecent exposure statute is unconstitutional on its face because of overbreadth and vagueness. More specifically, Defendant argues that the statute applies, in general, to speech that is constitutionally protected, that it fails to give adequate notice of the specific conduct that is proscribed, and that it permits arbitrary enforcement by government officials. *Wilson*, 95 Mich Appropriate 440 at 443.

A. OVERBREADTH

A statute is overbroad if, in addition to proscribing activities, which may be constitutionally prohibited, it also encompasses within its coverage conduct or speech that is constitutionally protected. *Thornill v Alabama*, 310 US 88 (1940). Generally, a person whose conduct can constitutionally be regulated by a statute does not have standing to contest the facial validity of that statute. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v Oklahoma*, 413 US 610, 610, 93 S. Court 2908, 37 L Ed 2d 830 (1973). However, the Court in *Broadrick* went on to state that an exception to this general principle of standing existed in order to allow a challenge to a statute when the overbreadth impinges upon First Amendment protections. *Id.* There are some guidelines, however. The Court distinguished between statutes primarily regulating conduct and those directly governing speech. In those cases of statutes governing conduct, the Court believed that for facial invalidation to be appropriate, "the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 614-615. The overbreadth must substantially infringe

upon First Amendment protections in such a way as to have a chilling effect on those rights.

In a similar case that involved challenges to the Michigan indecent exposure statue, the Court of Appeals stated that where "[expressive conduct, not pure speech, is regulated and the statute's application to conduct protected by the First Amendment is, at most, minimal," there was no substantial overbreadth to invalidate the indecent exposure statute. *Wilson*, 95 Mich Appropriate 440 at 445. Therefore, this Court, in keeping with *Wilson*, concludes that there is no substantial overbreadth.

B. VAGUENESS

A statute is unconstitutionally vague if "(1) it is overbroad, impinging on First Amendment freedoms, or (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured or unlimited discretion on the trier of fact to determine whether the offense has been committed." *People v Murphy*, 203 Mich Appropriate 738, 747; 513 NW2d 451 (1994), citing *Woll v Attorney. General*, 409 Mich 500, 533; 297 NW2d 578 (1980), on remand, 116 Mich Appropriate 791; 323 NW2d 560 (1982). For the above-stated reasons, this Court concludes that Defendant's First Amendment rights have not been implicated by the indecent exposure statute. Therefore, we examine the vagueness challenge by applying the indecent exposure statute to the particular facts of this case. See *People v Cavaiani*, 172 Mich Appropriate 706; 432 NW2d 409 (1988); *People v Lynch*, 410 Mich 343; 301 NW2d 796 (1981). Defendant argues that the language of the statute, especially the terms "open" and "indecent" are not clear enough so as to provide him with notice of what is deemed proscribed conduct.

When making a vagueness determination, "a statute is not vague if the meaning of the words in controversy can be

fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Vronko*, 228 Mich Appropriate at 653, citing *Cavaiani*, 172 Mich Appropriate at 714. In *Vronko*, the Court of Appeals examined a similar vagueness challenge to the indecent exposure statute. In that case, the Court relied upon dictionary definitions of "open" and "indecent exposure to assist in its determination. "Open" is defined as "exposed to general view or knowledge," "having no protective covering," and "to disclose or expose to view." *Vronko*, 228 Mich Appropriate at 653-664, citing Webster's New Collegiate Dictionary (1977). "Indecent exposure" is defined as an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community." *Id.* Given these definitions, it is clear that the indecent exposure statute provided fair notice to Defendant that his conduct was proscribed, despite the fact that it occurred on the public access channel, and that it did not confer upon the trier of fact unstructured and unlimited discretion to determine if a crime had, in fact, been committed. Therefore, in keeping with precedent, the indecent exposure statute is not unconstitutionally vague as applied to Defendant.

Defendant's final argument is that the Michigan indecent exposure statute denies him equal protection. As stated above, the statute does not impinge upon Defendant's freedom of speech. Therefore, the statute is not subject to strict scrutiny as Defendant submits. Defendant also does not suggest that he is a member of a recognized "suspect class" which would cause the statute to be examined under a stricter scrutiny. His argument that the "impermissible classification scheme" consists of the GRTV program versus those programs that have full frontal nudity on cable and in films does not come under the umbrella of a protected class

like race, alienage, etc. Nor does Defendant provide evidence that the statute has been applied in a discriminatory manner. Therefore, Defendant's equal protection claim must also fail.

For the above-stated reasons, Defendant's Motion to Dismiss is hereby denied.

August 28, 2001 /s/
J. Michael Christensen

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Compiled Laws

750.335a. Indecent exposure (2000)

Sec. 335a. Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other

provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

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